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No. 87-281

Supreme Court, U.S.
FILED
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 84-5627, No. 84-5770 and No. 84-5946

Henry Crawford, et. al.
Respondents

v.

La Boucherie Bernard et. al.

CA 83-0780

—o—

No. 84-5628, 84-5771, and No. 84-5947

Raymond Donovan, Secretary of
U.S. Department of Labor
Respondent

v.

Bernard H. Goldstein, et. al.
Petitioners

CA 83-0940

—o—

PETITION FOR CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

—o—

DANIEL B. BLAKE, III
No. 090209
910 17th St., N.W.
Suite 201
Washington, D.C. 20006
(202) 293-4850
(703) 549-4283

Attorney for Petitioner

41 pp

QUESTIONS PRESENTED

1. Can the United States Court of Appeals confirm a flawed order by a Federal District Court resulting in a confiscation, rather than restitutional offset, of an interest in an ERISA controlled profit sharing plan; resulting in an improper judgment and civil RICO judgment?

2. Why did the District Court ignore the offset recommendations of the Department of Labor (a co-plaintiff) and the Receiver of the plan; resulting in the flawed order?

3. Can the United States Court of Appeals deny consideration of a relevant Supreme Court ruling of June 22,1987 (Agency Holding Corp. v. Malley-Duff Associates), without explanation to the Appellant?

4. Can the United States Court of Appeals nullify the Rule 60 (b) motion, FRCP, of the Appellant by refusing to hear, consider or rule on said motion?

PARTIES TO THE PROCEEDINGS

1. Petitioner: Bernard H. Goldstein owning 64.7% interest in the Plan.

2. Respondents are: (a) Henry Crawford and 14 Plan Participants owning only 25% interest in the Plan c/o William Osborneand James Ray, Attorneys.

(b) Roy Schotland, Receiver, appointed by District Court in April 1983

(c) Raymond Donovan, Secretary, Department of Labor

3. Other potential future respondents (parties in Case No. CA 87-0228 now being appealed to the U.S. Appellate Court:

(a) Robert Dolan and 395-495 Associates

(b) Gary Hurst and Hurst Properties

(c) Madison National Bank

(d) Solicitor General of the United States

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No. _____

IN THE
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No. 84-5627, No. 84-5770 and No. 84-5946

Henry Crawford, et. al.
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Bernard H. Goldstein, et. al.
Petitioners

o

PETITION FOR CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

o

Petitioner's Bernard H. Goldstein respectfully asks and suggests that a unit of certicrari issue to review the judgments

and opinions of the U.S. Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 27, 1987, May 21, 1987 and August 5, 1987.

OPINIONS BELOW

A. The basic opinions and orders of the United Court of Appeals include the following:

1. Its 3/27/87 13 page Slip Opinion (Appendix A, also reported in 815 F2d 117 to 123). On pp. 6 and 12 of the Slip Opinion it recognizes the equitable remedy of "offset" in lieu of (but not in addition to) "forriture". (a) on page 13 of Slip Opinion, it is not clear which judgment is affirmed.

(b) This opinion also fails to mention or indicate that it never reviewed or even considered 2 appeals concerning (1) the order 8/3/84 relating to the BRIL Partnership Real Estate (Appendix I or (2) the October 1984 Order (Appendix K) relating to Petitioners 8/29/33 - Rule 60(b) Motion.

2. Its 5/21/87 order (Appendix B) denying Petitioners, Petition for Rehearing and Petitioners Suggestion for Rehearing en banc (Appendix C)

JURISDICTION

1. This litigation was begun in 1983 when the Private Plaintiffs (Crawford et al.) and the Department of Labor (Respondents and Appellees) filed complaints in the U.S. District Court for the District of Columbia against La Boucherie Bernard et. al. and the Goldsteins' (Petitioners and Appellants) under Civil RICO (18 USC §§ 1961) for alleged breach of fiduciary duties. By a series of summary judgment the District Court entered a $997,821.38 judgment against Petitioner Goldstein under ERISA for restitution on 1/20/84; and, on 7/6/86 awarded the Profit Sharing Plan treble damage in the amount of $1,995,642.76 under Civil RICO. (18 USC § 1964)

2. Those judgments along with other Court orders including orders with references to "offsets" and forfitures were appeal to the U.S. Appellate Court for the District of Columbia Circuit under Rules 3 and 4 of the FRAP, and this Petition for Writ of Certiovani is being filed pursuant to 28 USC § 2101 (c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. CONSTITUTION AMENDMENT NO. 5

"No person shall be ... deprived of ... property without due process of law, nor shall property be taken without due process of law..."

2. ERISA (29 USC 1101)

3. RICO (18 USC 196 4[c])

STATEMENT OF THE CASE

The Statement of the Case as readily expressed by District Court Judge Greene, in his opinion on behalf of the United States Court of Appeals for the District of Columbia Circuit, March 27, 1987, as follows:

" This case presents primarily the question whether, not withstanding the so-called Anti-alienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Act authorizes a Court to OFFSET a party's interest in a Plan covered by that statute against a judgment based on the party's breaches of duty to the same plan. For the reasons discussed below, we conclude that ERISA does allow such an OFFSET...

It is the July 6,1984 order that is before us on this appeal and, as noted, the issue here is whether the Court had the power to order such an OFFSET...

The District Court's order in this case to OFFSET the Goldstein's interests in the plan in satisfaction of their judgment debt is fully consistent with these principles...

If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not to violate it, and that if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust...will be taken by the court in order to make good the loss...

In short, the OFFSET remedy adopted by the District Court is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA...

The broad equitable remedies authorized by ERISA against fiduciaries who wrongfully deplete plan assets to the detriment of beneficiaries can best - perhaps only - be effective here by applying the traditional trust remedy of an OFFSET...

For the reasons stated, the judgment of the District Court is

Affirmed."

REASONS FOR GRANTING THE WRIT

The decision rendered by the United States Court of Appeals on March 27,1987, is in direct conflict with their admission that OFFSET had been applied in the determination of the original judgment of $997,821.38, as is evidenced by the following exhibits and explanations thereof.

EXHIBIT "A" - AFFIDAVIT OF BERNARD GOLDSTEIN

This affidavit executed on May 4, 1983, indicates willingness of the Appellant to co-operate and effect a speedy settlement of the case. Item 7 states that the Plan owned 49% of BRIL Associates. There was no dispute to this or any of the other facts stated, yet the Appellate decision on p. 4 & 3, interpreted this as a loan, not as an investment.

EXHIBIT "B" - CONSENT ORDER

This order of May 19, 1983, specifically states that "The plan will, beginning July 1,1983, pay interest monthly to Madison National Bank...

Madison shall not undertake any action to foreclose on the Shell Oil Park property before June 1, 1985. The Receiver, however, in spite of this order defaulted on the monthly payments beginning in October, 1984, resulting in a foreclosure in February, 1985. This action took place without the written consent of the District Court.

EXHIBIT "C" - ORDER OF SEPTEMBER 29, 1983

This order established an equitable trust on the BRIL property; this action having been compatible with the affidavit of Bernard Goldstein, Item 15, EXHIBIT "A".

EXHIBIT "D" - SECRETARY OF LABOR RESPONSE

This motion by the Secretary of Labor (coplantiff) points out legal errors made by the District Court in awarding fees to the plaintiff attorneys.

EXHIBIT "E" - MEMORANDUM OF POINTS AND AUTHORITIES

This memorandum submitted by plaintiff attorneys, further qualifies the use of OFFSET that should have been applied by the District Court in their orders of both January 20, 1984 and July 6, 1984.

EXHIBIT "F" - Page FROM SECRETARY OF LABOR's BRIEF TO THE APPELLATE COURT

This page fully explains the position of the co-plaintiff, the Department of Labor.

EXHIBIT "G" - PRIVATE PLAINTIFF OPPOSITION

This statement by the co-plaintiff again refers to OFFSET, which was not applied by the District Court.

EXHIBIT "H" - NOTICE OF FILING BY DEPARTMENT OF LABOR

An examination of this submission by the Department of Labor at the request of the District Court further establishes the principle of OFFSET that was ignored by the District Court.

EXHIBIT "J" - COMMENTS BY DEFENDANT, ACCOUNTANT's REPORT OF PLAN, DISTRICT COURT ORDER OF APRIL 22, 1987, ERRONEOUS RETURN OF DOCUMENT FROM DISTRICT COURT AND REPLY TO COURT's ERROR, MOTION FROM BERNARD GOLDSTEIN IN A RELATED CASE.

These various documents are self-explanatory and reflect the bias and prejudice of the District Court against the defendant.

EXHIBIT "K" - LETTER FROM ROY A. SCHOTLAND, RECEIVER FOR THE PLAN, TO JUDGE T.P. JACKSON.

This letter from the Receiver acknowledges in Item (e) the existence of the interests of the Goldstein's in the plan and the application of those interests in OFFSETTING judgment liability.

EXHIBIT "L" - MOTION OF PLAINTIFF

MAY 21, 1987

This motion by Goldstein in a related case explains the facts relevant to the BRIL property and its consequent mishandling by the Court appointed Receiver.

EXHIBIT "M" - SECRETARY OF LABOR MOTION IN A RELATED CASE.

Page 2 illustrates the misunderstanding of the actions of the District Court by the Secretary of Labor. In addition, the appraised value of the Bril property was never considered by the Court when it established the January 20, 1984 judgment of $997,821. against the Goldsteins.

EXHIBIT "N" - SUPPLEMENTAL MOTION FOR REHEARING EN BANC

This motion was rejected by the United States Court of Appeals, in spite of the inclusion and explanation of the facts that were relevant to the June 22, 1987 ruling of the United States Supreme Court. (Agency Holding Corp v. Malley-Duff Associates)

CONCLUSION

Based on the interpretation of the Depart-- ment of Labor memo in Exhibit "F" and the inclusion of the appraised value of the BRIL property as of January, 1984, the total projected value of the Plan at the time of the District Court's order of January 20, 1984, would have been:

RECEIVER'S PROJECTION OF ASSETS INCLUDING THE JANUARY 20, 1984 JUDGMENT	$1,377,765.
APPRAISED VALUE OF BRIL PROPERTY	1,000,000.
GROSS VALUE OF PLAN	2,377,765
LESS: AMOUNT DUE MADISON BANK ON MORTGAGE	(498,000)
NET VALUE OF PLAN	1,879,765
GOLDSTEIN INTEREST (63.961%)	1,202.316

If the true value of the Goldstein interests were $1,202,316. and the amount due the Plan was $977,821, as determined by the Department of Labor, then the Goldsteins were entitled to receive $204,495, subject to the sale of the BRIL property. How did both the District Court and the United States Court of Appeals overlook these pertinent facts and allow both a flawed judgment to exist and a subsequent RICO judgment?

The failure of the United States Court of Appeals to consider the United States Supreme Court ruling in the Agency Holding Corp. v. Malley-Duff Associates remains unanswered.

For the foregoing reasons and the enclosed exhibits, which will further substantiate the facts that OFFSET was not applied by the District Court and obviously overlooked by the United States Court of Appeals, the petition for Certiorari should be granted.

WHEREFORE, Petitioner requests the Supreme Court of The United States to grant this petition for writ of certiorari and for all other just and proper relief.

Respectfully submitted,

Daniel B. Blake,III
No. 090209
Attorney at Law
910 17th St., N.W.
Suite 201
Washington, D.C. 20006
(202) 293-4850
(703) 549-4283

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5627

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5628

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

HENRY CRAWFORD, et al., INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 84-5770

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5771

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

No. 84-5946

HENRY CRAWFORD, et al.

v.

LA BOUCHERIE BERNARD LTD., et al.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

No. 84-5947

RAYMOND J. DONOVAN, SECRETARY,
U.S. DEPARTMENT OF LABOR, et al.

v.

BERNARD H. GOLDSTEIN, et al., APPELLANTS

ROY A. SCHOTLAND, ESQ., RECEIVER,
DISTRICT HOTEL SUPPLY, INC.
PROFIT SHARING PLAN

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-00780 and 83-00940)

Argued January 17, 1986

Decided March 27, 1987

Daniel B. Blake, III for appellants in Nos. 84-5627, 84-5628, 84-5770, 84-5771, 84-5946 and 84-5947.

William W. Osborne, Jr., with whom *Jonathan G. Axelrod* and *James S. Ray* were on the brief for appellees, Crawford, et al. in Nos. 84-5627, 84-5628, 84-5946 and 84-5947.

Ellen L. Beard, Attorney, Department of Labor, with whom *Thomas L. Holtzman*, Attorney, Department of Labor was on the brief for appellee, Secretary of Labor in Nos. 84-5627, 84-5628, 84-5770, 84-5771, 84-5946 and 84-5947.

Before: MIKVA and BORK, and HAROLD H. GREENE,* *District Judge.*

Opinion for the Court filed by *District Judge* GREENE.

GREENE, *District Judge*: This case presents primarily the question whether, notwithstanding the so-called anti-alienation provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Act authorizes a court to offset a party's interest in a plan covered by that statute against a judgment based on the party's breaches of duty to the same plan. For the reasons discussed below, we conclude that ERISA does allow such an offset.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

I

Appellant Bernard Goldstein, defendant below, was chief executive officer and majority owner of two corporations, La Boucherie Bernard, Ltd., and District Hotel Supply, Inc. Bernard Goldstein was also a participant in and trustee of a profit-sharing plan established for the corporation's employees, the District Hotel Supply, Inc., Profit Sharing Plan. Appellant Jack Goldstein, Bernard's brother, also a defendant below, was an employee of both corporations and a participant and trustee of the Plan.

In 1978, Bernard Goldstein, along with his wife and two children, established a partnership called BRIL Associates for the purpose of purchasing real estate in Virginia on which to build a new company headquarters. On December 14 of that year, BRIL bought real estate in Fairfax County, Virginia, from the Shell Oil Company, the purchase being financed by a first mortgage from Madison National Bank and a second mortgage from Shell Oil.

During the next three years a series of transactions occurred involving the Goldsteins' profit sharing plan and the BRIL property in Fairfax. Details aside, the Goldsteins ultimately transferred some $461,000 in Plan assets to BRIL or for BRIL's benefit. The Goldsteins never repaid this money to the Plan; they made nc agreement to repay the money; and they made no provision to pay interest on the amount so "borrowed."

Between May 1980 and June 1982, the Goldsteins also transferred $163,000 from the Plan to La Boucherie Bernard, a corporation that was predominantly owned by Bernard Goldstein and that was also a Plan sponsor. Additionally, they used Plan assets within that same time period to satisfy a tax obligation of La Boucherie Bernard; declared a contribution to the Plan which was never paid; and engaged in other transactions in violation of their fiduciary duties under ERISA.

Suit was brought by fifteen participants in the Plan,[1] including appellee Crawford, and on January 20, 1984, the District Court granted summary judgment in favor of the Plan against the Goldsteins, upon a finding that the latter had breached their fiduciary duties as Trustees of the Plan and had violated ERISA's prohibited transactions provisions by misusing Plan assets for their own benefit and that of others. *See* ERISA §§ 404(a)(1)(A), (B), and (C), 406(a)(1)(D), and 406(b)(1) and (2), 29 U.S.C. §§ 1104(a)(1)(A), (B), and (C), 1106(a)(1)(D), and 1106(b)(1) and (2) (1982).

The judgment thus entered against Bernard and Jack Goldstein jointly and severally was for $976,822.38, and the judgment against Bernard Goldstein alone for $20,999. On July 6, 1984, when the Goldsteins had failed to pay any of the judgments, the court granted the motion of the Plan participants for equitable enforcement of these judgments, and it ordered the Goldsteins' own beneficial interests in the Plan to be offset and applied to their judgment debts. It is the July 6, 1984 order that is before us on this appeal and, as noted, the issue[2]

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[1] These Plan participants were employees or former employees of Boucherie Bernard.

[2] The Goldsteins also argue somewhat mysteriously that the order was a confiscation of their property in violation of the Fifth Amendment to the United States Constitution, but no authority is cited for this proposition, and it entirely lacks merit. Moreover, since the Goldsteins did not file a timely notice of appeal from the underlying ERISA judgment, we lack jurisdiction to review the merits of the breach of duty issues and will consider only the issue of offset. The District Court's order granting summary judgment to plaintiffs under ERISA, and certifying that judgment as final under Fed. R. Civ. P. 54(b), was issued on January 20, 1984. The corollary judgment was entered on the court's docket sheet on April 10, 1984. The first notice of appeal was not filed until September 4, 1984, nearly five months later.

Under Fed. R. App. P. 4(a)(1) and 28 U.S.C. § 2107, the notice of appeal in a civil case such as this must be filed

here is whether the court had the power to order such an offset.

II

ERISA is a comprehensive remedial statute enacted to:

> protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

Under section 409(a) of the Act, 29 U.S.C. § 1109(a), a person who breaches his fiduciary duties to a pension plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." Section 502(a) of the statute, 29 U.S.C. § 1132(a), in turn authorizes the Secretary of Labor and any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section [409]" or to obtain an injunction or "other appropriate equitable relief" to redress a fiduciary violation.

As may be deduced from this language, where a party has breached his fiduciary duty, the courts have broad authority under the statute to fashion remedies for re-

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within 60 days after entry of the judgment or order appealed from. While the District Court may extend this filing time for up to 30 days, the Goldsteins never moved for an extension of time, and their notice of appeal was thus late by almost three months. *See Browder* v. *Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978); *Moorer* v. *Griffin*, 575 F.2d 87 (6th Cir. 1978). Finally, it is clear that, contrary to the Goldsteins' argument, the ERISA judgments were not interlocutory but final since, as the Goldsteins concede in their brief (at 13), the District Court entered final judgment under Rule 54(b).

dressing any breach and for protecting the interests of participants and beneficiaries. *See, e.g., Donovan* v. *Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983) (upholding order requiring appellants to post $1 million bond). The legislative history of section 409(a) further underlines what is apparent from the statutory language. Thus, the Report of the Senate Committee on Labor and Public Welfare states that:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . *The intent of the committee is to provide the full range of legal and equitable remedies available in both state and federal courts* . . . .

S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4871 (emphasis added). Similarly, Senator Harrison A. Williams, Chairman of the Committee, made clear the congressional direction to the federal courts to draw on principles of traditional trust law, stating that:

> The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 Cong. Rec. S-15737, Aug. 22, 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5177, 5186; *see also Eaves* v. *Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

Trust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust. *Id.*

The District Court's order in this case to offset the Goldsteins' interests in the Plan in satisfaction of their

judgment debt is fully consistent with these principles. When plaintiffs requested such an order, their final judgment against the Goldsteins had already remained unpaid after some six months. In the absence of an offset order, the Receiver of the Plan might well have been obligated to include the Goldsteins in a distribution of Plan assets to all eligible participants, in accordance with the governing Plan documents.[3] Since the Goldsteins held more than sixty per cent of the beneficial interest in the Plan, such a distribution would in effect have further rewarded them for their wrongdoing, and innocent Plan beneficiaries would still not have received their due.

Rather than to allow such an inequity, traditional trust law would clearly support the forfeiture of the beneficial interest of a breaching fiduciary in order to offset the losses suffered by the trust. As one authority on trusts states:

> If a beneficiary is also a trustee of his own trust, acting for himself and others, it is elementary that as trustee he owes the beneficiaries a duty to perform the trust and not to violate it, and that if he steals trust funds, or causes damage to the trust estate in other ways, his share under the trust . . . will be taken by the court in order to make good the loss.

Bogert, *Trusts and Trustees* § 191, at 484 (2d ed. 1979). Professor Scott has reached the same conclusion, stating that:

> [i]f the trustee is also one of the beneficiaries . . . the other beneficiaries can compel him to make good the breach of trust out of his beneficial interest in the trust property. The defaulting trustee-beneficiary

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[3] Such a distribution might have been called for, for example, if the corporate assets had been sold to another corporation. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), requires a fiduciary to act in accordance with the documents and instruments governing the plan to the extent that they are consistent with the provisions of the Act.

> is not entitled to receive his share of the trust property until he has made good the loss which resulted from his breach of trust. The other beneficiaries can insist that his interest be impounded to make good the loss; they are entitled to a charge upon his interest to indemnify them for the loss.

III *Scott on Trusts* § 257, at 2201 (3d ed. 1967).

In short, the offset remedy adopted by the District Court is not only consistent with ERISA's purpose of providing effective remedies for fiduciary breaches, but it is also among the traditional trust principles that Congress intended to be incorporated into the law of employee benefit plans under ERISA.

III

The Goldsteins argue, however, that ERISA's anti-alienation provision calls for a different result. This provision, section 206(d)(1) of the Act, 29 U.S.C. § 1056 (d)(1), mandates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Moreover, an identical provision in section 401(a)(13) of the Internal Revenue Code of 1954, 26 U.S.C. § 401(a)(13), has been interpreted by the Treasury Department to prohibit not only voluntary assignment and alienation, but also attachment, garnishment, or levy by operation of law. 26 C.F.R. § 1.401(a)-13(b)(1). Indeed, the Secretary of Labor has recognized that most courts have construed section 206(d)(1) to prohibit the garnishment of pension benefits by creditors, and that the legislative history of the statute supports that interpretation. *See, e.g., General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980) (section 206(d)(1) includes "all encroachments, both voluntary and involuntary").

The anti-alienation rule has not been regarded as immutable, however. For example, various decisions have implied a limited exception to permit the garnishment of plan benefits in order to satisfy family support and

community property obligations contained in divorced decrees. *See, e.g., American Telephone & Telegraph Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979), and *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers International Union, Pacific District—Pacific Maritime Association Pension Plan* v. *Stone*, 453 U.S. 922 (1981).[4]

Similarly, the garnishment of an employee's pension fund interest has been permitted to satisfy liabilities arising from his criminal misconduct toward his employer. *St. Paul Fire and Marine Insurance Co.* v. *Cox*, 752 F.2d 550 (11th Cir. 1985). In that case, the Eleventh Circuit expressly rejected an argument that, since the anti-alienation provision of ERISA prevented assignment of plan funds to individual claimants, they also prevented the fund from garnishing defendant's interest. Said the court: "[t]here is no reason to conclude that ERISA requires the abrogation of the equitable principle that a wrongdoer should not benefit from his misdeeds," and that "[o]f prime importance to the courts in considering implied exceptions to the non-alienation provisions have been the congressional objectives behind ERISA, and the effect of the proposed exceptions on those goals." *Id.* at 552 (citing *American Telephone & Telegraph* v. *Merry, supra*, 592 F.2d at 120-25; *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1154-56 (S.D.N.Y. 1978)).

We agree with the Eleventh Circuit. ERISA was established to protect "the continued well-being and security of millions of employees and their dependents" by providing "minimum standards . . . assuring the equi-

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[4] Further, a participant or beneficiary may make voluntary and revocable assignments, totaling not more than ten per cent of future benefit payments, once benefits are in "pay status" and provided that the voluntary assignment is not intended to defray plan costs; and benefits may be pledged as collateral to secure loans from the plan, if the plan so permits. R. Osgood, *The Law of Pensions and Profit Sharing* § 1.9.4 (1984).

table character of [pension fund] plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). Given the fundamental congressional purpose to have the courts apply trust principles to disputes such as this, and given that the law of trusts is grounded in a strong equitable policy not to permit a trustee to benefit from his own breaches, we have no difficulty in concluding that the anti-alienation portion of the statute does not stand in the way of the remedy adopted here. A contrary interpretation would permit trustee wrongdoers to benefit from their misdeeds at the expense of those whom ERISA was designed to protect. Under such a construction, the Goldsteins, who repeatedly and indeed blatantly breached their fiduciary duties to the pension plan they created, would be allowed to evade their court-ordered responsibility to make restitution for the money they wrongfully obtained, and Plan members and their families would have to watch their pension monies once again disappear into the Goldsteins' pockets.

The Goldsteins argue that to allow an offset under the circumstances of this case would frustrate the protective purposes of ERISA's anti-alienation rule.[5] In the first place, an offset here creates no risk of interference with ongoing Plan operations, since the Plan will cease operating in any event. Moreover, the Goldsteins will not be unfairly deprived of anticipated retirement benefits, since the offset operates as if they were receiving the full amount of benefits they would have received had the Plan had not been depleted by their wrongdoing.[6] Finally, as indicated, the purpose of ERISA's anti-alienation provision—to protect plan beneficiaries by ensuring that plan asests are used only for payment of benefits—would be undermined, not advanced, by an interpretation that pro-

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[5] The purpose of that provision is "to protect a person and those dependent on him from the claim of creditors." *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1156 (S.D.N.Y. 1978).

[6] The amount is merely credited against their judgment debt to the Plan.

hibited offset under these circumstances. The broad equitable remedies authorized by ERISA against fiduciaries who wrongfully deplete plan assets to the detriment of beneficiaries can best—perhaps only—be effectuated here by applying the traditional trust remedy of an offset.

IV

On July 6, 1984, the District Court granted summary judgment in favor of the Profit Sharing Plan, under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961 *et seq.* (1982), and awarded the Plan treble damages against Bernard Goldstein in the amount of $1,995,642.76. Appellant Bernard Goldstein's challenge to this RICO judgment can be disposed of briefly.

First. Appellant argues that he may not be found liable in a civil RICO action without a prior criminal conviction and a separate racketeering injury (other than an injury flowing from the predicate acts). Suffice it to say that appellant's theory was rejected by the Supreme Court's recent decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985).[7]

Second. Appellant contends next that the District Court erred by applying findings of fact made under

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[7] The *Sedima* court said that it could:

> find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

Id. at ——; 105 S. Ct. at 3284. Similarly, the *Sedima* court held that there is no requirement that a private plaintiff establish a distinct "racketeering injury". *Id.* at ——, 105 S. Ct. at 3285.

ERISA to the RICO claim, one that thus arose under a different statute. The foundation for this argument is difficult at best to make out, and even more difficult to accept. Bernard Goldstein admitted to making transfers of Plan assets with full knowledge that those transfers were illegal. Such an admission supports not only a finding of a violation of ERISA duties but also a violation of 18 U.S.C. § 664, the statutory predicate for appellant's RICO violation.[8] That statute prohibits "an intentional breach of special fiduciary duties imposed by other regulatory statutes or governing instruments." The same facts underlie both claims, and the same findings of fact may be applied to both.

Third. Appellant also argues that summary judgment was improperly granted because he was denied a jury trial on the issue of intent. This argument is equally meritless. Although state of mind is usually a question for the jury, this does not preclude a court from finding intent, on summary judgment, where that intent "may be inferred from objective facts." *See, e.g., Washington Post Co.* v. *Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Fourth, appellant challenges the District Court's determination of liability, which included a trebling of damages, to over $1.9 million, pursuant to RICO. Appellant asserts that, in fact, he owes only $50,000, and he claims that an award above that amount constituted an abuse of discretion. No support or justification whatever are offered for this bare conclusory statement. In sum, the District Court's application of RICO was proper in all respects.

For the reasons stated, the judgment of the District Court is

Affirmed.

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[8] RICO, at 18 U.S.C. § 1961(1), defines "racketeering activity" as the commission of one of 41 federal and state crimes, including embezzlement from pension and welfare funds under 18 U.S.C. § 664.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMIBA CIRCUIT

o

No. 84-5627 September Term, 19
CA No. 83-00780

Henry Crawford, et. al.

v.

La Boucherie Bernard Ltd., et. al.

United States Court of Appeals
For The District of Columbia Circuit
FILED MAY 21 1987
GEORGE A. FISHER
CLERK

And Consolidated Case Nos. 84-5628
84-5770, 84-5771, 84-5946, 84-5947.

BEFORE: MIKVA and BORK, Circuit Judges; HAROLD GREENE*, District Judge, U.S. District Court for the District of Columbia

O R D E R

Upon consideration of petitioners' petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

PER CURIAM
GEORGE A. FISHER, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

* Sitting by designation purusant to 28 U.S.C. Section 292(a).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19 86
CA No. 83-00780

NO. 84-5627

United States Court of Appeals
For The District of Columbia Circuit

FILED MAY 21 1987

GEORGE A. FISHER
CLERK

Henry Crawford, et. al.

v.

La Boucherie Bernard Ltd., et. al.

And Consolidated Case Nos. 84-5628, 84-5770, 84-5771, 84-5946, 84-5947.

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges; Harold Greene*, District Judge, U.S. District Court for the District of Columbia

O R D E R

Petitioners' suggestion for rehearing en banc has been transmited to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

PER CURIAM,

FOR THE COURT;
GEORGE A. FISHER, CLERK

Appendix C

BY: /s/
Robert A. Bonner
Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 292(a).
Chief Judge Wald did not participate in this order.

ATTACHMENT NO. 16

PARALLEL TABLES BETWEEN DEPOSITION PAGES AND CORRESPONDING PAGES IN THE JOINT APPENDIX VOL. III

1. Pages 89-90 para. 16, Vol. 1 of Appendix say: illegality of:

a) "Goldstein admitted the knowledge and understanding of the his investments of Plan assets through BRIL in purchase of Shell Property."

b) References in depositions to support this statement appear on page 89, Vol. 1, para. 16, which are:

Goldstein Deposition I	Location in Joint Appendix
p. 106-10	p. 1013-1017, pg. 1014 line 14-19
p. 116-17	p. 1018 & 984
p. 135-36	p. 1036-1037
p. 139-40	p. 1040-1041
p. 143-44	p. 1044-1045
Goldstein Deposition II	
p. 29-48	p. 1308-1326
p. 82- (83)	p. 1359-(1360)
p. 84-86	p. 1361-1363
p. 89-97	p. 1366-1374

c) A careful examination of the references in (b) above (at the right margin, will show they do not support item 1(a) above on pp. 89-90 para. 16 in Vol. 1 of Appendix.)

2. The same criticism can be made of Para. 14 on pg. 89 of Vol. 1 of J.A. See page 16 of the Memorandum of Points and Authorities above.

3. See & Compare para. 21 of pg. 90 of Vol. 1 of J.A.

Supreme Court, U.S.
FILED
SEP 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BERNARD H. GOLDSTEIN,
Petitioner

v.

HENRY CRAWFORD, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM OF HENRY CRAWFORD, ET AL., IN OPPOSITION

WILLIAM W. OSBORNE, JR.
JOHN R. MOONEY
BEINS, AXELROD & OSBORNE, P.C.
1200 Fifteenth Street, N.W.
Suite 505
Washington, D.C. 20005-2816
(202) 429-1900

JAMES S. RAY
CONNERTON & BERNSTEIN
1920 L Street, N.W.
4th Floor
Washington, D.C. 20036
(202) 466-6790

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals properly allowed an employee benefit plan to offset a trustee's interest in the plan in satisfaction of judgments against the trustee for embezzlement of plan assets.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM OF HENRY CRAWFORD, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 815 F.2d 117.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1987, and a petition for rehearing was denied on May 21, 1987. The petition for a writ of certiorari was filed on August 18, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, is attached as App. A-1.

STATEMENT

The undisputed record reveals that this action was brought by former employees of LaBoucherie Bernard, Ltd. and its predecessor in interest, District Hotel Supply Inc. (collectively the "Company"), who were participants in the District Hotel Supply, Inc. Profit Sharing Plan. (Pet. App. 5a). The Plan was created in 1962 as a trust to provide retirement benefits to Company employees and was established and required by the terms of the Plan to be maintained for the exclusive benefit of its employee participants.

Since 1968, Petitioner Bernard Goldstein was the owner and chief executive officer of the Company, as well as one of two Trustees of the Plan. Jack Goldstein, Bernard's brother, was also an employee of the Company and the second Trustee of the Plan. (Pet. App. 4a). Both of them were Plan participants.

BRIL Associates ("BRIL"), formerly known as BRIL Joint Venture, was a District of Columbia partnership established by the Goldstein family in 1978 for the sole purpose of buying real estate in Virginia on which to construct a headquarters building for the Company. BRIL's original partners were Bernard Goldstein, his wife and children. (Pet. App. 4a).

During December 1978, Bernard Goldstein caused BRIL to buy a parcel of undeveloped real estate (the "BRIL land") in Virginia from the Shell Oil Company for $455,789.60. That purchase was financed through a loan from a commercial bank secured by a first mortgage and a second mortgage loan from the seller. (Pet. App. 4a). Through a series of transactions starting in 1979, Bernard Goldstein illicitly converted a total of some $461,000 in Plan assets to or for the benefit of BRIL. (Pet. App. 4a).

In addition to the transfer of Plan assets to the BRIL partnership, Bernard and Jack Goldstein, as Trustees

of the Plan, misappropriated Plan assets from 1980 through 1982 through numerous transactions totalling some $200,000, including diversions to Petitioner Goldstein and the Company. (Pet. App. 4a).

None of the misappropriations of Plan assets to BRIL, Goldstein or the Company was ever the subject of a written loan agreement, and none of the Plan assets so taken was ever repaid to the Plan. Bernard Goldstein admitted his knowledge and understanding of the illegality of his use of Plan assets to purchase and finance the BRIL property. He also admitted that he knew that the non-BRIL misappropriations were illegal.

In March 1983 the Plaintiffs filed suit against Petitioners for refusing to provide them with information concerning their retirement benefits. They also sought an accounting of the Plan's assets and the removal of Petitioner Goldstein as Trustee. Shortly thereafter, the United States Department of Labor ("the Department") also filed suit against Goldstein seeking equitable relief under ERISA, and thereafter the cases were consolidated. In July 1983, Plaintiffs amended their complaint by adding allegations that Bernard Goldstein had engaged in prohibited transactions with respect to the Plan and had breached his fiduciary duties in violation of ERISA. The Plaintiffs also alleged that the Petitioner was civilly liable for violations of Title 18 of the United States Code relating to Racketeer Influenced and Corrupt Organizations ("RICO"), 18 U.S.C. § 1961, *et seq.*

On the basis of uncontested facts, the district court granted the Plaintiffs' and Department's motions for summary judgment on the ERISA issues in favor of the Plan and against Plan Trustees Bernard and Jack Goldstein on September 30, 1983 and January 20, 1984. The judgment held them jointly and severally liable for $976,822.28 and Bernard Goldstein liable for an ad-

ditional $20,999. (Pet. App. 5a). The court entered a second summary judgment in favor of the Plan on July 6, 1984 under RICO and awarded the Plan statutory treble damages against Bernard Goldstein. That same day, the district court entered a remedial order allowing the Plan to offset Goldstein's interest in the Plan against the judgments. (Pet. App. 5a-6a). The judgments against Petitioner Goldstein for his misappropriations of Plan assets far exceeded his interest in the Plan.

The court of appeals affirmed the district court's decision and declared that ERISA, through its inclusion of well settled common law trust principles, allows for a pension plan to offset a trustee's interest in the plan against a judgment running to the plan based on the trustee's embezzlement of assets from the same plan. (Pet. App. 9a).

ARGUMENT

The sole issue raised by the Petitioner in this case is whether the lower courts erred in the application of the admittedly appropriate legal authorities. (Pet. at 14-15).[1] Petitioner acknowledges that both ERISA and common law trust principles allow an employee benefit plan to offset a trustee's interest in the plan in satisfaction of judgments against the trustee for breach of fiduciary duties to the plan. (Pet. at 9). Nevertheless, Petitioner contends that both courts improperly confiscated his interest in the Plan. This fact-bound contention does not warrant review by this Court.

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[1] Petitioner also ostensibly raises the issue of the court of appeals' denial of his motion for reconsideration and refers to this Court's decision in *Agency Holding Corp. v. Malley-Duff Associates*, 483 U.S. ——, 97 L. Ed. 2d 121 (1987). In *Agency Holding Corp.*, this Court set forth a limitations period for civil actions under the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* Petitioner, however, has never raised the statute of limitations as a defense in this action below and cannot attempt to raise it at this time.

1. In enacting ERISA, Congress authorized the federal courts to exercise the full range of remedial powers available under trust law to fashion remedies for breaches of fiduciary duty by trustees. ERISA Section 409(a), 29 U.S.C. 1109(a), provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title *shall be personally liable to make good to such plan any losses to the plan* resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan to the fiduciary, *and shall be subject to such other equitable or remedial relief as the court may deemed appropriate*, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act. (Emphasis added).

In addition, ERISA Section 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), authorizes "appropriate equitable relief (i) to redress [ ] violations of [ERISA or of the terms of a plan] or (ii) to enforce any provisions of [ERISA] or the terms of the plan." Moreover, one of ERISA's declared purposes was to protect employees' interest in benefit plans by "providing for approprate remedies, sanctions, and ready access to the Federal Courts." ERISA Section 2(b), 29 U.S.C. § 1001(b).

Congress intended by these provisions to grant to the courts "broad authority to fashion remedies for redressing the interests of participants and beneficiaries." *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). *Accord, IAM National Pension Fund v. Wakefield Industries, Inc.*, 699 F.2d 1254, 1261 (D.C. Cir. 1983) (ERISA's enforcement provisions have been specifically designed to provide participants and beneficiaries with broad remedies for redressing or preventing violations).

According to ERISA's legislative history,[2] these enforcement provisions were "designed to furnish 'broad remedies for redressing or preventing violations of the Act . . . [including] the full range of legal and equitable remedies available in both state and federal courts.'" *Donovan v. Bierwirth*, 754 F.2d 1049, 1052 (2d Cir. 1985), *quoting* H. Rept. No. 93-533, 93d Cong., 1st Sess. 17 (1973). *Accord, Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978). Congress clearly intended the courts "to draw on principles of traditional trust law . . . 'which provides for broad and flexible remedies in cases involving breaches of fiduciary duty'. . . . Courts also have 'a duty to enforce the remedy which is most advantageous to the participants and most conducive to effectuating the purpose of the trust.'" *Mazzola*, 716 F.2d at 1235, *quoting, Eaves*, 587 F.2d at 462.

2. It is a fundamental principle of trust law that the beneficial interest of a trustee-beneficiary who has misappropriated trust assets may be taken to satisfy the loss to the trust. Moreover, the misappropriation of trust assets by a trustee-beneficiary constitutes an anticipa-

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[2] The objective of ERISA's enforcement provisions is to "make applicable the law of trusts, . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.' 120 Cong. Rec. S-15737 (daily ed., August 22, 1974, remarks of ERISA sponsor Sen. Harrison A. Williams, Jr.) as quoted in *Eaves*, 587 F.2d at 462. *See also Leigh v. Engle*, 727 F.2d 113, 139 (7th Cir. 1984) (ERISA incorporates the trust law remedy of disgorgement of profits earned by a trustee with plan assets "to promote [the plan participants'] interest by removing the fiduciary's incentive to misuse trust assets"); *Free v. Briody*, 732 F.2d 1331, 1337-1338 (7th Cir. 1984) (ERISA Section 409 and its legislative history demonstrate that "Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans."); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984) ("[I]t is well-settled that ERISA grants the courts wide discretion in fashioning equitable relief to protect the rights of pension fund beneficiaries . . . .").

tion of the trustee's beneficial interest and extinguishes that interest where the trustee's obligations to the trust exceed the amount of the interest. Bogert, *Trusts and Trustees*, § 191 at 484 (Rev. 2d ed. 1979); III *Scott on Trusts*, § 257 at 2201 (3d ed. 1967). *See also Restatement of Law of Trusts*, § 257. This offset remedy is consistent with ERISA's purpose of providing effective remedies for a fiduciary's breach of duty and is among the traditional trust principles incorporated into the law of employee benefit plans under ERISA. Because it provides a remedy for an employee benefit plan to remedy defalcations committed by a trustee, this principle is not inconsistent with ERISA's anti-alienation provisions. ERISA Section 206(d)(1), 29 U.S.C. § 1056(d)(1), and 26 U.S.C. § 401(a)(13). These provisions were intended to shield a participant's interest in a plan from assignment or alienation by or for the benefit of third parties but not to allow a breaching fiduciary to escape liability to an injured plan. There is no dispute among the lower courts on this issue.

3. A conflict among the lower courts may exist, however, as to the applicability of the anti-alienation provisions to situations where an employee's criminal conduct is directed at an employer. In *St. Paul Fire & Marine Insurance Co. v. Cox*, 752 F.2d 550 (11th Cir. 1985), the court found that Congress did not intend the anti-alienation provisions to create a windfall for employees who engage in criminal acts directed at the employer. It then allowed the employer to garnish funds held in the employer's profit sharing plan. Conversely, the Sixth Circuit in *United Metal Products Corp. v. National Bank of Detroit*, 811 F.2d 297 (6th Cir. 1987), *cert. pet. pndg*, held that ERISA does not allow an employer to take an employee's interest in a plan "due to an employee's fraudulent or criminal conduct directed against an employer." *Id.* at 300. Both of these cases concerned an *employee's* criminal acts against *the employer* rather than a *trustee's*

criminal acts against *the plan itself*. In the instant case, unlike *St. Paul Fire & Marine Insurance Co.* and *United Metal Products Corp.*, the Plan suffered direct injury because of the trustees' unlawful activity. Therefore, the resolution by this court of the apparent conflict between *St. Paul Fire & Marine Insurance Co.* and *United Metal Products Corp.* is irrelevant to the instant petition. Regardless of the scope of the anti-alienation provisions in employer-employee situations, those provisions have never been interpreted to preclude an employee benefit plan from satisfying a judgment against a defalcating trustee by offsetting the trustee's interest in the plan against the judgment.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM W. OSBORNE, JR.
JOHN R. MOONEY
BEINS, AXELROD & OSBORNE, P.C.
1200 Fifteenth Street, N.W.
Suite 505
Washington, D.C. 20005-2816
(202) 429-1900

JAMES S. RAY
CONNERTON & BERNSTEIN
1920 L Street, N.W.
4th Floor
Washington, D.C. 20036
(202) 466-6790

Dated: September, 1987

APPENDIX

ERISA Section 409(a), 29 U.S.C. § 1109(a) provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore any such plan any profits of such fiduciary which have been made through use of assets of the plan to the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deemed appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 41 of this Act.

Supreme Court, U.S.
FILED
OCT 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-281

In the Supreme Court of the United States

OCTOBER TERM, 1987

BERNARD H. GOLDSTEIN, ET AL., PETITIONERS

v.

HENRY CRAWFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

JEFFREY A. HENNEMUTH
Attorney
Department of Labor
Washington, D.C. 20210

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-281

BERNARD H. GOLDSTEIN, ET AL., PETITIONERS

v.

HENRY CRAWFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioners, who were trustees of and participants in a pension plan, contend that the courts below improperly offset their entire interest in the plan against their adjudicated liability to the plan for breach of fiduciary duties. They primarily argue that the actual value of their interests in the profit-sharing plan exceeded the amount of their liability to the plan, thus entitling them to retain a portion of those interests.

1. Petitioners Bernard and Jack Goldstein were participants in and trustees of the District Hotel Supply, Inc., Profit Sharing Plan (the Plan), a pension plan established for the employees of two corporations owned and operated by petitioners. Between June 1979 and February 1982, petitioners transferred some $461,000 in Plan assets to or for the benefit of a real estate partnership owned by petitioner Bernard Goldstein (C.A. App. 334-337). This money was never repaid to the Plan, and petitioners did not make any agreement to repay the money or to pay interest on the amounts "borrowed" from the Plan. Peti-

tioners also transferred, between May 1980 and June 1982, a total of $163,000 from the Plan to one of the two sponsoring corporations and Plan assets were used to satisfy a tax obligation of that corporation. Additionally, a contribution to the Plan by a sponsoring corporation was declared but never paid. Petitioners engaged in other, similar transactions also prohibited by provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. III) 1101 *et seq.* Pet. App. 4a.

In March 1983, the Secretary of Labor and 15 participants in the Plan brought suit against petitioners, alleging that, by their diversions of Plan assets for their own benefit, they had breached their fiduciary duties as trustees of the Plan, and had violated ERISA's prohibited transactions provisions. See 29 U.S.C. 1104(a)(1)(A), (B) and (C), 1106(a)(1)(D), 1106(b)(1) and (2). The district court granted summary judgment in favor of the Plan against petitioners jointly and severally for $976,822.38, and against petitioner Bernard Goldstein individually for $20,999, and entered final judgment against them pursuant to Fed. R. Civ. P. 54(b). When petitioners failed to make any payments, the court granted the Plan participants' motion for equitable enforcement, ordering that the petitioners' own beneficial interests in the Plan be offset and applied to their judgment debts to the Plan. Pet. App. 5a-6a & n.2.

The court of appeals affirmed (Pet. App. 1a-13a). The court addressed only the district court's power to order offset, and did not review its judgment that petitioners had breached various fiduciary duties and owed the Plan nearly $1 million, because petitioners had failed to file a timely appeal challenging that judgment (*id.* at 5a-6a n.2). After reviewing the relevant statutory provisions and ERISA's legislative history concerning remedies for fiduciary breaches, the court concluded that the offset remedy adopted by the district court was consistent with Congress's intent to provide effective remedies for such

breaches and with its intent to protect beneficiaries from depletion of pension plan assets by wrongdoing trustees (*id.* at 6a-9a, 10a-12a).[1]

2. Petitioners claim that their interests in the Plan were undervalued and that the extent of their liability to the Plan was overestimated, and, as a result, their interests in the Plan should not have been offset entirely. They do not claim that the decision of the court of appeals conflicts with any decision of this Court or of any other court of appeals, and it does not. In that circumstance, none of the fact-bound issues raised by petitioners warrants review by this Court.

As we understand the first two questions petitioners present (see Pet. i, 14-15), they allege that their interests in the Plan were undervalued by the courts below. But neither the court of appeals' opinion nor the district court's order granting enforcement of the judgment through offset affixed any specific value to their interests in the Plan. Thus, petitioners inaccurately portray as "flawed" judgments that do not address the precise factual issue they wish to

---

[1] The court of appeals also affirmed a judgment entered in favor of the 15 Plan participants on their claims against Bernard Goldstein under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. III) 1961 *et seq.* (Pet. App. 12a-13a). Petitioners seem to request in their third question presented (Pet. i) that this Court review whether any of those claims are barred by the four-year statute of limitations adopted for civil RICO actions in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, No. 86-497 (June 22, 1987). Although the government is not a party to the RICO action, we note that the district court entered summary judgment against Bernard Goldstein under RICO based on the same facts on which judgment was entered against petitioners under ERISA. Since the Plan participants' complaint, stating both statutory causes of action, was filed in March 1983, less than four years after petitioners began the unlawful use of Plan assets in June 1979, it appears that the four-year statute of limitations, if otherwise applicable, was met in the case.

litigate.[2] In any event, whether the value of their interests in the Plan was miscalculated is not an issue warranting this Court's attention.[3]

Petitioners' fourth question presented (Pet. i) related to whether they may obtain review of the judgment finding them liable to the Plan in the amount of nearly $1 million. However, as the court of appeals concluded (Pet. App. 5a-6a n.2), they are barred from challenging that judgment. The district court entered final judgment on that issue pursuant to Fed. R. Civ. P. 54(b) on April 10, 1984. Their notice of appeal was not filed until September 4, 1984, nearly five months later (Pet. App. 5a n.2), although a notice of appeal was due within 60 days after entry of judgment (28 U.S.C. 2107; Fed. R. App. P. 4(a)). Petitioners' failure to file a timely appeal precluded appellate consideration of the issues resolved in the April 10 judgment, including the specific amount of petitioners' liability

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[2] In a separate action, *Goldstein* v. *Schotland*, Civ. Action No. 87-0228 (D.D.C.), petitioners have challenged the court-appointed receiver's acquiescence in the foreclosure sale of certain Plan property, arguing that rescission of the sale, and resale of the property at its fair market value, would increase the value of their interests in the Plan. The district court dismissed petitioners' complaint and a notice of appeal has been filed challenging that dismissal. Certain exhibits mentioned in the petition (Pet. 9-13) relate to that other proceeding, and are not part of the record in this case.

[3] Petitioners suggest (Pet. 14-15) that the Department of Labor agrees that their interest in the Plan exceeded the amount they owed to the Plan, so that the offset produced an inequitable result. That is not so. The Department argued precisely the opposite both in the district court and in the court of appeals. Petitioners rely (Pet. 14) on an unofficial appraisal of the "BRIL property" that listed its value at $1 million (with a mortgage of nearly half that amount). However, the sale of that property netted almost no profit after the mortgage and related expenses were paid (June 3, 1985, U.S. C.A. Br. 14 n.5). Therefore, petitioners' interest in the Plan turned out to be less than the amount of the judgment against them. As noted (note 2, *supra*), petitioners are seeking rescission of the sale of that property in a separate action.

to the Plan. See *Browder* v. *Director, Illinois Dep't of Corrections,* 434 U.S. 257, 264 (1978). The court of appeals therefore properly declined to review the underlying judgment that petitioners are liable for their breaches of fiduciary duty and owe the Plan nearly $1 million, and confined its review to the order granting equitable enforcement of that judgment. Petitioners' claim (see Pet. i, Question 4) that the underlying judgment should be reviewable because a motion for relief from judgment was filed under Fed. R. Civ. P. 60(b) on September 28, 1984, is wrong. The denial of a Rule 60(b) motion is reviewed under the abuse of discretion standard, and an appeal from a denial of a motion for relief from judgment does not bring up the underlying judgment for review. *Browder*, 434 U.S. at 263 n.7.[4]

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[4] The question primarily considered by the court of appeals, whether the anti-alienation provisions of ERISA and the Internal Revenue Code bar the use of an offset remedy, is similar to the question presented in No. 86-1786, *United Metal Products Corp.* v. *National Bank of Detroit.* However, as we explained in our brief submitted in that case in response to the court's invitation to the Solicitor General to present the views of the United States (at 10-11 n.8), the decision below allowing offset is not inconsistent with the holding of the Sixth Circuit in *United Metals Products Corp.* that an employer may not garnish the pension plan account of a participant who, unlike petitioners, was not a trustee of the pension plan. Since petitioners do not raise the question whether the anti-alienation provisions bar the offset remedy, there is no reason to hold this petition pending this Court's determination whether to grant the petition in *United Metal Products Corp.* As noted in our brief in that case (at 16-17), the question presented in *United Metal Products Corp.* (but not here) is related to the question presented in No. 86-1387, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, which the Court will hear on the merits; since petitioner raises no question related to the question presented in *Mackey* (and, indeed, does not cite *Mackey* or *United Metal Products Corp.*), there is no reason to hold this petition for that case. (We are serving copies of our briefs in *United Metal Products Corp.* and *Mackey* on counsel for petitioners.)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

JEFFREY A. HENNEMUTH
Attorney
Department of Labor

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(4)

No. 87-281

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 84-5627, No. 84-5770 and No. 84-5946

Henry Crawford, et. al.
Respondents

v. CA 83-0780

La Boucherie Bernard et. al.

—o—

No. 84-5628, 84-5771, and No. 84-5947

Raymond Donovan, Secretary of
U.S. Department of Labor
Respondent

v. CA 83-0940

Bernard H. Goldstein, et. al.
Petitioners

— o —

SUPPLEMENT FOR
PETITION FOR CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

— o — —o—

DANIEL B. BLAKE, III
No. 090209
910 17th St., N.W.
Suite 201
Washington, D.C. 20006
(202) 293-4850
(703) 549-4283

Attorney for Petitioner

EDITOR'S NOTE

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QUESTIONS PRESENTED

5. Whether the condition had developed deliberately or inadvertently, can the Federal Courts permit the timing, orchestrating and even manipulating of the FRCPs, FRAPs and RICO to result in litigants like Goldstein (and even the Profit Sharing Plan) being caught in "Procedural traps" so that they can be effectively denied procedural due process of law which defacto results in confiscating millions of dollars of their property and in that sense depriving them of substantive due process in violation of the 5th (Fifth) Amendment.

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI UNDER RULE 22.6

Pursuant to Rule 22.6 of this Court by this Supplement to the Goldstein's Petition for a Writ of Certiorari in No. 87-281, Goldstein requests and urgently suggests that the current scheduled conference on Nov. 6, 1987 for review of this Petition No. 87-281 be deferred until 1988 for the following reasons:

1. As confirmed by statements and reasons below and for reasons in Questions Presented 5 as stated on p. (i) above, the current scheduled Nov. 6, 1987 conference for No. 87-281 should be deferred.

2. The BRIL Partnership Real Estate which is involved in the Goldstein Certiorari Petition No. 87-281 has a current market value by a sale on No. 6, 1986 of over $2,500,000. (Fairfax County

Va. Deed Record 6542, p. 1980), and is the subject of a new appeal in U.S. Appellate Court (D.C.) in No. 37-5297 which was docketed on 10/28/87.

3. As a result of the above, the current Petition in No. 87-281 is interlocutory in fact with respect to this overall litigation, and should be reviewed in the light of the new developments stated in para. 4 below, and this is especially true of the Rule 60(b) Motion and its related issues.

4. While the appeals were pending in Federal Courts in No. 87-281 and while the Bril Real Estate involved in those appeals was in the custody of a federal court receivership and a federal receiver, that receiver permitted the real estate to be sold at foreclosure sale on 2/27/86 for only $530,000 contrary to U.S. Supreme Court Case law making such a sale void or voidable as stated in Issacs v. Hobbs Tie

and Timber Co, (1931). 282 US 734, 735, 736 and Ex. Parte Taylor (1983) 14 US, 164, 13 S Ct. 785.1* Goldstein in 1987 by complaint attempted to establish a constructive trust in favor of the BRIL Partnership for the benefit of himself and the Plan. A constructive trust on the BRIL Real Estate and the Windfall Profits in the posession of Mr. Hurst and Mr. Dolan as a result of 2/27/85 and 11/6/86 sales. The District Court dismissed the complaint and Appeal No. 87-5297 was docketed in the Appellate Court on 10/28/87. At stake are millions of dollars not only for Goldstein, but also for the BRIL Real Estate Partnership, and for the Profit Sharing Plan.

1* Also involved is Durret v. Washington National Insur. Co.(CC-DC 1980) 621 F2d 201 because current market value of the BRIL Real Estate was about 5 times the foreclosure sale as disclosed by sales records.

5. The interrelationship of these appeals is important to all litigants. The facts in this Appeal No. 37-5297 are not in dispute.

WHEREFORE, Petitioner Goldstein requests and suggests: (1) that the scheduled conference for Nov. 6, 1987, No. 87-281, be deferred and (2) that Petitioner be directed to present to this Supreme Court by Supplemental Brief under Rule 22.6 the details of the undisputed facts involved in the related Appeal No. 87-5297.

Respectfully submitted,

Daniel B. Blake, III
No. 090 0209
Attorney for Petitioner
Bernard H. Goldstein
910 17th St, NW #201
Washington, DC 20006
(202) 293-4850
(703) 549-4283

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Respondent

v.) CA 83-0940

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Petitioners

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REPLY BRIEF FOR

PETITION FOR CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

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DANIEL B. BLAKE, III
No. 090209
910 17th St., N.W.
Suite 201
Washington, D.C. 20006
(202) 293-4850
(703) 549-4283

Attorney for Petitioner

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HANDBOOK ON CRIMINAL LAW, (Hornbook Series) Justin Miller (1934) West Publishing Co., St. Paul, Minn at Page 380,footnote 34.	8.

RESPONSE REPLY BRIEF

Pursuant to Rule 22.5 of this Supreme Court Petitioner submits this Reply Brief or Memorandum in reply to the Respondents Memoranda or Briefs filed 9/16/87 and 10/19/87.

As a result of the Solicitor's 10/19/87 Memorandum in opposition, this Certiorari Petition argument is now, divided into two basic parts:

I. Failure of the Federal Courts to Review Goldstein's Rule 60(b) Motion which they ignored and which was an extraordinary violation of judicial discretion, which in itself warrants a reversal for this litigation.

II. The Appellate Court 3/27/87 error in affirming the 7/6/87 RICO judgment which action by the Appellate Court is in conflict with this Supreme Courts 7/1/85 decision on page 17 of the slip opinion in the Sedima Case 105 SCt. 3275, US .

This result follows because there was no loss, no injury and no damage to anyone on 7/6/84 to be trebled. See Exhibit O in Exhibits Vol. II.

____o____

1. Failure of the District and Appellate Courts to Consider or Review Petitioner's Sept. 30, 1984 Rule 60(b) Motion (Pet. (i) 4).

Without such a review the 3/27/87 opinion (Pet. 1a - 13a; 815 F2d 117-123) is flawed and must be reversed for failure to make such a review. This follows because the 60(b) Motion (at JA Vol. V - pp. 1625 - 1713) was timely filed with respect to the issues stated in Attachment 16 (See the 8/16/87 Pet. a 17a) and the issues stated in JA Vol. V - pp. 1625-1713 and pp. 2714 - 2810 which were fully briefed for the

Appellate Court. This complete briefing was done in Goldstein's 5/3/85, 6/17/85, 1/10/86 and 1/21/86 Briefs and/or Citations of Authorities. (See Exhibits P,Q,R and S in Exhibits Vol. III).

It was an extraordinary breach of judicial discretion for the U.S. District and Appellate Courts to completely ignore the Goldstein's Rule 60(b) Motion which was timely filed and adequately and completely briefed.

See not only or merely Footnote 7 cited by the Solicitor General, but also read the entire case and note in particular the concurring opinions in:

> Browder v. Director of Illinois Dept. of Corrections (1973) 434 U.S. 215, 257, 263, 54 L Ed 2d 523, 530.

A denial of this motion on appeal and/or on Petition for Certiorari would be an extrordinary breach of judicial discretion flawing the underlying 1/20/84 judgment.

With that 1/20/84 Judgment flawed as stated above there would be no underlying judgment to support either the 7/6/84 offset(forfiture)order and the 7/6/84 RICO order on pp. 12 and 13 of the 3/27/87 slip opinion; Pet. a 12 and 13)

II. Argument Concerning Goldstein's Challenge to the 7/6/84 Forfiture Order (JA Vol. I at pp. 529-530; JA Vol. II 643 at p. 679) and the 7/6/84 RICO Order (JA Vol. I at pp. 531-532; JA Vol. II 643 at p. 696) without directly challenging the 1/20/84 ERISA judgment of $997,821 itself. (Pet. 5a, 12a and 13a) Basically these arguments are:

A. If either the District Court or the Appellate Court had applied the "Offset" concept developed in the 3/27/87 opinion (Pet. a 12); then, there would have been no justification for: 1) A Forfiture Order in addition to an "Offset" on 7/6/84,

or 2) A RICO treble damage order on 7/6/84 (JA 696) which was for an additional $1,995,642.76 (Pet. App. 12a) (JA Vol. I at pp. 531-532)

B. The foregoing follows because the Appellate Court Records and this Supreme Court records disclose the following:

(1) On July 6, 1984 the Goldstein's combined beneficial interest in the Plan amounted to $881,232.76 of the Plans assets of $1,377,765 "...(including the full face value of the 1/20/84 ERISA $997,821.38) judgment."...but not including the value ...of the BRIL (Partnership) land at the time of the forfiture order. This (beneficial) interest on 7/5/84 was $116,588 short of the ERISA 1/20/84 Judgment before the approval of the bond settlement on 7/6/84 (JA 650) but $61,080 in excess of that ERISA 1/20/84 judgment immediately after the bond settlement of $177,000 had

been approved on 7/6/84 (JA 650) but before issuing the "Offset" (forfiture) Order (JA 679) and the RICO Order (JA 695) on 7/6/84. At the time of the "Offset" (Forfiture) and RICO Orders on 7/6/84, there were no losses, injuries or damages to anyone (but the Goldstein's) and nothing to treble under RICO. Immediately after accepting the $177,000 bond settlement on 7/6/84 as stated above, no person in the Plan suffered any injury and no "damages" had been "sustained". Therefore there was no legal basis for the appellate court in its 3/27/87 order to affirm, (at Pet. a 12 and 13a) the RICO order of 7/6/84. This is supported and confirmed by Exhibit O in Exhibits Vol. II. See: RICO (18 USC 1964(c) and Sedima et al v. Impex et al (7/1/85) 473 US 479, 105 S Ct. 327, 329, 4739 (Slip Opinion p. 17 lines 5-10). As a result of the foregoing examine the following:

(1) The U.S. Supreme Court in interpreting RICO in Sedima et al v. Immex Co. et al, Supra which held:

(a) "the plaintiff only has standing and can only recover to the extent he has been injured..." (See slip opinion p. 17 line 4)

(b) "... nor is the defendant liable to those who have not been injured..." (see slip opinion p. 17 line 10).

(2) The related RICO statute in 18 USC 1964 (c) which states:

(a)"... injured by reason of a violation of Sec. 1962 ..." and

(b)"... and shall recover threefold the damages he sustains ..."

III. Miscellaneous Issues

A. Note also that if as a result of the Rule 60(b) review the plaintiff fails to establish beyond a reasonable doubt that there was a malicious intent or mens rea in

making the extrordinary profitable investment in the BRIL Real Estate; then, the injury would not have been caused by conduct constituting a violation of Sec. 1962 or predicate act. See p. 17 of the slip opinion of the July 1, 1985 Sedima Case of this Supreme Court in 105 S Ct. 3275, 473 US 479.

B. In addition it is doubtful whether under the common law concepts of the criminal law a man can embezzle his own property or his partnership property. (See Handbook on Criminal Law, West Publ. Co. (1934) p.380 by J. Miller.

C. The conclusions, statements of law, quotation and legal citations included in paragraphs Second, Third, and Fourth on pp. 12 a and 13 a 8/16 Pet.) erroneous and wrong.

WHEREFORE, Petitioner Goldstein requests and suggests: (1) that the scheduled conference for Nov. 6, 1987, No. 87-281, be deferred and (2) that Petitioner be directed to present to this Supreme Court by Supplemental Brief under Rule 22.6 the details of the undisputed facts involved in the related Appeal No. 87-5297.

Respectfully submitted,

Daniel B. Blake, III
No. 090 0209
Attorney for Petitioner
Bernard H. Goldstein
910 17th St, NW #201
Washington, DC 20006
(202) 293-4850
(703) 549-4283